Hotel Jagokota (Lahad Datu) Sdn Bhd v Golden Palms Hotel Sdn Bhd

HIGH COURT (KOTA KINABALU) — CIVIL APPEAL NO BKI-12BNCvC-8/8 OF 2019
AMELATI PARNELL JC
23 AUGUST 2021

Contract — Agreement — Sale and purchase agreement — Claim for shortfall of balance purchase price — Whether purchaser admitted to part payment of purchase price — Whether admitted facts had same value and weight as facts that proven after full trial — Whether purchaser liable to vendor for late payment interest — Whether vendor waived rights to claim for interest — Whether appellate intervention warranted

This was an appeal against the whole decision of the sessions court after full trial which dismissed the appellant's claim with costs. The appellant was the registered and beneficial owner of three parcels of land with two blocks of eight-storey hotel building erected thereon known as Hotel Jagokota ('the said hotel'). By a sale and purchase agreement ('the said agreement'), the appellant as vendor sold and the respondent as purchaser purchased the said hotel from the appellant for the sum of RM8.4m. Pursuant to the said agreement, the respondent had paid the appellant a sum of RM8,369,160. The appellant commenced a suit against the respondent at the sessions court claiming the sum of RM30,840.20 or any part thereof being the shortfall of the balance of the purchase price for the sale of a hotel and the sum of RM143,734.94 as at 21 September 2018 (and continuing) being late payment interest at the rate of 4%pa as per cl 3(d) of the sale and purchase agreement. The sessions court judge ('SCJ') in dismissing the appellant's claim, held, inter alia, that the appellant had failed to show to the court that the respondent had not paid the purchase price in full. The issues that arose for determination on appeal were: (a) whether the respondent had paid the purchase price in full pursuant to the sale and purchase agreement; and (b) whether the respondent was liable to the appellant for the late payment interest at the rate of 4%pa.

Held, allowing the appeal with costs:

(1) As the total purchase price for the hotel was the sum of RM8.4m, there was a shortfall of RM30,840.20 (RM8,400,000 – RM8,369.160). As such, the first issue for trial before the sessions court, ie, 'whether the defendant had paid the purchase price in full to the plaintiff under the sale and purchase agreement should have been answered in the negative in favour of the appellant without further deliberation. Facts which had

been agreed and admitted, should have the same value and weight as facts that were proven after a full trial. The learned SCJ had fallen into error when she failed to consider that the total payment made by the respondent showed a shortfall of RM30,840.20 based on the crucial and conclusive evidence in the form of judicial admissions or concessions in the pleadings, and also unequivocal admission on the part of the respondent's witness, DW1. The failure by learned SCJ clearly invited an appellate intervention for non-judicial appreciation of the evidence. The appellant therefore had proven its claim for the balance of purchase price due from the respondent and was entitled to the 4% interest as per cl 3(d) of the sale and purchase agreement (see paras 10, 12, 18 & 26).

(2) By cl 3(b) of the sale and purchase agreement, the respondent was supposed to pay the full balance of the purchase price by 30 September 2016, which it failed or did not pay. As such, pursuant to cl 3(d), the respondent was automatically granted an extension of time of one month to pay the same subject to payment of interest of 4%pa from the expiry of the completion date until such time the purchase price was received by the appellant within the extended completion date to be calculated on a daily basis. The crucial words in that clause were 'until such time the purchase price was received by the vendor within the extended completion date'. The words relied by the respondent, ie, 'within the extended completion date' did not refer to the time limit for payment of the 4% interest but referred to the time frame for the respondent to make or pay the balance of the purchase price. Therefore, the respondent was liable to the appellant for the late payment interest as claimed by the appellant (see paras 30–31 & 37).

(3) The respondent's contention that the appellant had waived the right to claim the 4% interest under cl 3(d) of the sale and purchase agreement was without merit. The respondent had failed to substantiate this contention during the trial. In any event, the respondent was not entitled to rely on this contention to vary or contradict the contents of the sale and purchase agreement, which was binding on the parties (see paras 32–34).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keseluruhan keputusan mahkamah sesyen selepas perbicaraan penuh yang menolak tuntutan perayu dengan kos. Perayu adalah pemilik berdaftar dan benefisial bagi tiga petak tanah dengan dua blok bangunan hotel lapan tingkat didirikan di atasnya dikenali sebagai Hotel Jagokota ('hotel tersebut'). Melalui perjanjian jual beli ('perjanjian tersebut'), perayu sebagai penjual telah menjual dan responden sebagai pembeli membeli hotel tersebut daripada perayu dengan jumlah RM8.4 juta. Menurut perjanjian tersebut, responden telah membayar perayu sejumlah RM8,369,160. Perayu memulakan tindakan terhadap responden di

A mahkamah sesyen dengan mendakwa jumlah RM30,840.20 atau mana-mana bahagian daripadanya adalah baki harga belian untuk penjualan sebuah hotel dan jumlah RM143,734.94 setakat 21 September 2018 (dan berterusan) sebagai faedah pembayaran lewat pada kadar 4% setahun seperti dalam klausa 3(d) perjanjian jual beli. Hakim mahkamah sesyen ('HMS') dalam B menolak tuntutan perayu, berpendapat, antara lain, bahawa perayu telah gagal untuk menunjukkan kepada mahkamah bahawa responden tidak membayar harga belian sepenuhnya. Isu-isu yang timbul untuk penentuan rayuan adalah: (a) sama ada responden telah membayar harga belian sepenuhnya menurut perjanjian jual beli; dan (b) sama ada responden bertanggungjawab kepada C perayu untuk faedah pembayaran lewat pada kadar 4% setahun.

Diputuskan, membenarkan rayuan dengan kos:

(1) Memandangkan jumlah harga belian hotel tersebut berjumlah RM8.4 juta, terdapat kekurangan sebanyak RM30,840.20 (RM8,400,000 – D RM8,369.160). Oleh itu, isu pertama untuk perbicaraan di hadapan mahkamah sesyen, iaitu, 'sama ada defendan telah membayar harga belian sepenuhnya kepada plaintif di bawah perjanjian jual beli sepatutnya dijawab secara negatif memihak kepada perayu tanpa E pertimbangan lanjut. Fakta yang telah dipersetujui dan diakui, hendaklah mempunyai nilai dan berat yang sama dengan fakta yang telah dibuktikan selepas perbicaraan penuh. HMS yang bijaksana telah terkhilaf apabila gagal mengambilkira bahawa jumlah pembayaran yang dibuat oleh responden menunjukkan kekurangan sebanyak F RM30,840.20 berdasarkan keterangan penting dan konklusif dalam bentuk pengakuan atau konsesi kehakiman dalam pliding, dan juga pengakuan yang jelas di pihak saksi responden, DW1. Kegagalan oleh HMS yang bijaksana jelas mengundang campur tangan rayuan untuk kekurangan penilaian kehakiman terhadap keterangan. Oleh itu, perayu G telah membuktikan tuntutannya untuk baki harga belian yang perlu dibayar daripada responden dan berhak mendapat faedah 4% seperti dalam klausa 3(d) perjanjian jual beli (lihat perenggan 10, 12, 18 & 26).

(2) Mengikut klausa 3(b) perjanjian jual beli, responden sepatutnya membayar baki penuh harga belian sebelum 30 September 2016, yang H mana ia gagal atau tidak bayar. Oleh yang demikian, menurut klausa 3(d), responden secara automatik telah diberikan lanjutan masa sebulan untuk membayarnya tertakluk kepada pembayaran faedah sebanyak 4% setahun dari tarikh tamat tempoh sehingga harga belian adalah diterima oleh perayu dalam tarikh penyiapan lanjutan untuk dikira setiap hari. I Perkataan penting dalam klausa tersebut adalah 'sehingga harga belian diterima oleh oenjual dalam tarikh penyiapan lanjutan'. Perkataan yang digunapaki oleh responden iaitu 'dalam tempoh lanjutan tarikh siap' tidak merujuk kepada had masa pembayaran faedah 4% tetapi merujuk kepada tempoh masa responden membuat atau membayar baki harga

belian. Oleh itu, responden bertanggungjawab kepada perayu untuk faedah pembayaran lewat seperti yang dituntut oleh perayu (lihat perenggan 30–31 & 37).

(3) Pendapat responden bahawa perayu telah mengetepikan hak untuk menuntut faedah 4% di bawah klausa 3(d) perjanjian jual beli adalah tanpa merit. Responden telah gagal untuk membuktikan pertikaian ini semasa perbicaraan. Dalam apa jua keadaan, responden tidak berhak untuk bergantung kepada pertikaian ini untuk mengubah atau bercanggah dengan kandungan perjanjian jual beli, yang mengikat kedua-dua pihak (lihat perenggan 32–34).]

Cases referred to

Bank Pertanian Malaysia Berhad (dahulunya dikenali sebagai Bank Pertanian Malaysia) v Nora' rifah bt Darus [2014] MLJU 490; [2014] 7 CLJ 631, CA (refd)

Inspector-General of Police & Anor v Alan Noor bin Kamat [1988] 1 MLJ 260; [1988] 1 LNS 101, SC (refd)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1, FC (refd)

Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395; [1996] 4 CLJ 545, CA (refd)

Trusjadi Holdings Sdn Bhd v Waris Selesa Sdn Bhd (in liquidation) [2018] 12 MLJ 86; [2018] 1 LNS 1488, CA (refd)

Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152; [1990] 1 CLJ Rep 330, SC (refd)

Legislation referred to

Civil Law Act 1956 s 11
Companies Act 1965 (repealed by Companies Act 2016)
Evidence Act 1950 s 91

Victor Chong Thien Loi (Poh & Victor Chong) for the appellant.
Amli Nohin (Nohin & Partners) for the respondent.

Amelati Parnell JC:

INTRODUCTION

[1] This is an appeal against the whole decision of the sessions court given on the 16 August 2019 after full trial which dismissed the appellant's claim with costs.

[2] The appellant's pleaded claims are for the sum of RM30,840.20 or any part thereof being the shortfall of the balance of the purchase price for sale of a

hotel and the sum of RM143,734.94 as at 21 September 2018 (and continuing) being late payment interest at the rate of 4%pa as per cl 3(d) of the sale and purchase agreement (pp 1–9 of ROA).

[3] The respondent/defendant in the statement of defence plead that the defendant had obtained a loan from its bank financier Public Bank Bhd to pay the balance purchase and the redemption sum which was RM7,387,000.

[4] The balance purchase price and/or full payment after deduction by the financier's solicitors in the sum of RM3,135,267.62 has since be released to the plaintiff's solicitor Messrs Salina Fadzil & Co, Advocates and Solicitors on 24 March 2017 (p 106 ROA) which was also the date of vacant possession given to the defendant pursuant to the agreement.

[5] At the trial, both party produced one witness each. Upon conclusion, the learned sessions court judge ('SCJ') found in favour of the defendant and her reasons are contained in her grounds of judgment ('GOJ') as appearing at pp 1–11 of supplementary record of appeal ('SRA').

STATEMENT OF AGREED FACTS

[6] By a statement of agreed facts at Bundle C (pp 74–77 of ROA), the parties agreed as follows:

(a) the plaintiff was and is at all material times a company incorporated in Malaysia under the Companies Act 1965 and having its registered address at MDLD 2713, Jalan Panji, PO Box 60052, 91110 Lahad Datu, Sabah, Malaysia;

(b) the defendant was and is at all material times a company incorporated in Malaysia under the Companies Act 1965 and having its address at Block A8, 2nd Floor, Grand Plaza Putatan, 88200 Putatan, Sabah, Malaysia;

(c) the plaintiff was at the material time the registered and beneficial owner of three parcels of land held under TL117506420, TL117509458 and TL117508657 in the District of Lahad Datu, Sabah together with two blocks of eight storey hotel building erected thereon known as Hotel Jagokota ('the said hotel');

(d) by a sale and purchase agreement in writing dated 1 July 2016 ('the said agreement'), the plaintiff as vendor sold and the defendant as purchaser purchased the said hotel from the plaintiff for the sum of RM8.4m subject to the terms and conditions therein contained;

(e) the terms and conditions of the said agreement, amongst others, provide:

(3) The purchase price shall be paid by the Defendant to the Plaintiff in the manner and times as follows:

(a) Upon the signing, the Defendant shall pay the sum of RM840,000.00 being deposit and part payment of the purchase price;

(b) The balance of the purchase price in the sum of RM7,560,000.00 shall be paid within three (3) months from the date of the said Agreement or upon release of a loan from a bank or financial institution whichever is the earlier ('the completion date');

(c) Notwithstanding that the Defendant may require a loan from a bank or financial institution to settle the balance of the purchase price or any part thereof, the Defendant shall remain personally bound to pay the same;

(d) In the event that the Defendant shall fail to pay the purchase price on the completion date, the Plaintiff shall automatically grant to the Defendant a further extension of one (1) month from the completion date ('the extended completion date') to pay the purchase price, provided that interest shall be payable by the Defendant to the Plaintiff on the amount outstanding calculated at the rate of four (4) percent (4%) per annum from the expiry of the completion date until such time the purchase price is received by the Plaintiff within the extended completion date to be calculated on daily basis;

(e) The Plaintiff shall deliver full vacant possession of the said Hotel to the Defendant immediately upon receipt of the full payment of the purchase price in accordance with the terms and conditions;

(f) Time whenever mentioned in the said Agreement shall be of the essence;

(g) Any notice or demand requiring to be served by either party thereto on the other under the said Agreement shall be in writing and shall be deemed to be served after the expiration of five (5) working days from the date of the notice or demand is sent by registered post to the respective addresses of the parties stated therein; and

(h) No delay or failure by either party to act in the event of a breach or default thereunder shall be construed as a waiver of that or any subsequent breach or default of any provision of the said Agreement.

(f) pursuant to the said agreement, the defendant had made the following payments to the plaintiff totalling RM8,369,160:

(i) deposit in the sum of RM840,000;

(ii) differential sum of RM210,000 on or around 6 October 2016;

(iii) redemption sum of RM3,067,427.42 on or around 27 March 2017; and

(iv) loan amount of RM4,251,732.38 on or around 27 March 2017

AGREED ISSUES TO BE TRIED

[7] Both parties have agreed that the issue to be tried are as follows:

(a) whether the defendant had paid the purchase price in full to the plaintiff under the sale and purchase agreement dated 1 July 2016?

(b) whether the defendant is liable to the plaintiff for the late payment interest at the rate of 4%pa as provided under cl 3(d) the sale and purchase agreement dated 1 July 2016 and/or alternatively pursuant to s 11 of the Civil Law Act 1956? and

(c) whether the plaintiffs entitled to the prayer in the statement of claim?

THE SCJ'S GOJ

[8] A perusal of the SCJ's GOJ the following were the reasons for her finding that plaintiff has failed, on a balance of probabilities, to prove its claim:

(a) the first issue agreed by both parties is whether the defendant had paid the purchase price in full to the plaintiff under the said sale and purchase agreement dated 1 July 2016. As to this issue, the court found that the plaintiff, as the one who brought this action, has failed to show to court that the defendant has not paid the purchase price in full;

(b) PW1 as the sole witness of the plaintiff has no knowledge on the important documents relied in supporting their claim ie document at pp 24–25 Bundle B respectively;

(c) most of the evidences given by PW1 goes back to what had been told to her by the mutual appointed counsel, Messrs Salina Fadzil & Co in respect of the sale and purchase agreement dated 1 July 2016;

(d) there is issue raised by the defendant on one of the payments stated in the plaintiff's statement of claim para 6 as well as stated in p 24 Bundle B ie payment of RM210,000 which the defendant plead in its statement of defence to be an advance payment (statement of defence para 4 referred);

(e) in the plaintiff's reply para 4, the plaintiff stated that the sum of RM210,000 was the purported differential sum paid by the defendant in respect of the shortfall between the deposit and amount of the loan obtained by the defendant to part finance the purchase of the said hotel. Undeniably, it can be seen that this sum of RM210,000 is listed as differential sum in document at p 24 Bundle B;

(f) however, since it is now alleged by the defendant that this is part of advance payment requested by the plaintiff's director and/or shareholders as they were in need of money. This issue is best resolved by

calling the solicitor who prepared document at p 24 Bundle B. Nevertheless, it was not done in this case and leaving this issue uncleared;

(g) the necessity is more apparent as in p 24 Bundle B, several other advances that has been made by the purchaser on behalf of the vendor towards the said agreement, were also listed, and it is amounting to RM973,465.43. The issue now is whether there is really a shortfall or actually there was a surplus in the payment of the purchase price. During the trial, PW1 has failed to explain this table of 'Advances' rendering this issue unresolved;

(h) by having this issue unresolved, especially in respect of a very important document relied by plaintiff in proving its claim of unpaid balance of purchase price, it could not be said that the plaintiff has managed to prove its claim on a balance of probabilities;

(i) PW1 being the sole witness, in proving plaintiff's case especially on the balance of purchase price not fully paid by the defendant, is seen to be of no clue on how the document at p 24 Bundle B could help in proving the plaintiff's case. Without any evidence, either from PW1 or from any documentary evidence tendered by the plaintiff, there is nowhere it could be said that the first issue has been proven by the plaintiff. Due to that, the court is of the view that the plaintiff has failed to prove its claim for the balance of purchase price alleged to have been due from the defendant; and

(j) since the first issue has not been successfully proven by the plaintiff, there is no basis to claim for interest. Thus, there is no way an order for interest as stated under prayer (b) could be allowed. Second issue hereby decided to have not been fully satisfied. The same goes with the third issue. With that, the plaintiff's claim hereby dismissed with costs.

EVALUATION AND FINDINGS OF THIS COURT

[9] It was submitted by the appellant that based on the statement of agreed facts, the respondent had unequivocally and clearly admitted that pursuant to the sale and purchase agreement, it had only made the following payments totaling RM8,369,160 to the appellant:

(a) deposit in the sum of RM840,000;

(b) differential sum of RM210,000 on or around 6 October 2016;

(c) redemption sum of RM3,067,427.42 on or around 27 March 2017; and

(d) loan amount of RM4,251,732.38 on or around 27 March 2017.

[10] As it is agreed and not disputed that the total purchase price for the hotel is the sum of RM8.4m (pp 84 and 103 of ROA), there was a shortfall of RM30,840.20 (RM8,400,000 – RM8,369.160). As such, the first issue for

trial before the lower court ie 'Whether the defendant had paid the purchase price in full to the plaintiff under the sale and purchase agreement dated 1 July 2016?' (p 78 of ROA) should have been answered in the negative in favour of the appellant without further deliberation.

[11] In this regard, having perused the GOJ, the learned SCJ did not at all touch on this very crucial issue nor she determined or made any finding on these matters despite the submission on the effect of admission as to the crucial facts made by the respondent.

[12] I am with the appellant that facts which had been agreed and admitted as aforesaid, shall have the same value and weight as facts that are proven after a full trial.

[13] In the Court of Appeal case of *Trusjadi Holdings Sdn Bhd v Waris Selesa Sdn Bhd (in liquidation)* [2018] 12 MLJ 86; [2018] 1 LNS 1488 (CA), it was stated that:

> [32] Thus, while it is true that item 92 was not pleaded by the appellant in Suit 86, its failure to plead the item does not disentitle it from relying on the item as it is clear on the agreed facts that the respondent's claim was for breach of contract and/or for specific performance, and not for adverse possession of the subject land. Facts that are agreed have the same value and weight as facts that are proved after a full trial.

[14] Further, from the pleadings of the parties in the present case, the facts have been unequivocally and clearly admitted by the respondent. The appellant had pleaded by para 6 of the statement of claim (p 5 of ROA) that:

> Pursuant to the said Agreement, the Defendant had made the following payments to the Plaintiff totaling RM8,369,160.00:
>
> (a) Deposit in the sum of RM840,000.00 on or around 01.07.2016;
>
> (b) Differential sum of RM210,000.00 on or around 06.10.2016;
>
> (c) Redemption sum of RM3,067,427.42 on or around 27.03.2017; and
>
> (d) Loan amount of RM4,251,732.38 on or around 27.03.2017.

[15] The respondent in para 4 of the statement of defence pleaded:

> The Defendant admits paragraph 6 of the Plaintiff's Statement of Claim except that the Deposit RM840,000.00 was paid much earlier to the Plaintiff to settle the said Hotel's foreclosure problem with the bank whilst the RM210,000.00 paid to the Plaintiff was an advance payment that was requested by the Plaintiff's Director and/or shareholders as they were in need of money.

[16] There is also a clear and unequivocal admission by the respondent's own

witness, DW1 during examination in chief, that only the amount RM8,369,160 was paid and there was a shortfall (pp 47–48 of ROA):

> Q. Refer to page 24 Bundle B, if you look at the first part titled sales and purchase of Hotel Jagokota, agree — with the payment as stated in the sale and purchase of Hotel Jagokota in the total sum of RM8,369,160.00, do you agree with the amount?
>
> A. Yes.
>
> Q. Do you know whether there is any shortfall in the amount?
>
> A. I only came to know this when the Plaintiff filed a suit against the Defendant.
>
> Q. Do you agree with the shortfall?
>
> A. Yes but I was never informed about this.
>
> Q. If you were informed of the shortfall on 24.03.2017 what would you have done?
>
> A. The shortfall is only a small amount which I could have paid easily.
>
> Q. Whose fault is it that you blamed that you have never received of the shortfall?
>
> A. Basically Salina & Fadzil never informed on such shortfall.

[17] Hence, the appellant is correct in submitting that once the facts have been unequivocally and clearly admitted by the respondent (based on para 6 of Bundle C) (p 76 of ROA), these facts ie that the respondent had only paid a total sum of RM8,369,160 are deemed to have been proven and shall have the same value and weight as facts proven after a full trial. As such, the appellant had clearly adduced sufficient evidence and satisfied its legal and evidential burden of proving such facts. The evidential burden then shifted to the respondent to show that it had paid more than RM8,369,160 or the full purchase price ie RM8.4m.

[18] With respect, the learned SCJ had fall into error when she failed to consider that the total payment made by the respondent shows a shortfall of RM30,840.20 based on the crucial and conclusive evidence in the form of judicial admissions or concessions in para 6 of Bundle C, in the pleadings, and also unequivocal admission on the part of the respondent's witness, DW1. The failure by learned SCJ clearly invites an appellate intervention for non-judicial appreciation of the evidence.

[19] Further, the sum of RM210,000 being 'an advance payment' which was in the statement of defence, could not possibly be considered as an evidence or proven fact in this case.

[20] DW1, the sole witness for the respondent, during his testimonies had never mentioned that this payment of RM210,000 was an advance payment

A (pp 45–53 of ROA) or part of the advances mentioned in the document at p 24 of Bundle B. DW1 in Q & A, lines 18–20, p 49 and line 1, p 50 of ROA, merely talked about the 'advances' of RM973,465.43 stated in p 24 of Bundle B, but the amount RM210,000 was not included as being a part of the 'advances'.

B

[21] I am with the appellant that, if at all, it is for the respondent to call the solicitor if it wishes to contradict the evidence of the appellant that the sum of RM210,000 was for 'differential sum'.

C **[22]** DW1's evidence that there was 'overpayment' is also not consistent with his initial evidence/stance where he admitted that there was a shortfall but only that he was not aware nor informed about the shortfall earlier by Messrs Salina Fadzil & Co.

D

[23] The fact that only a total sum of RM8,369,16 was paid in fact was further conceded in paras 3–5 of the defendant's written submission filed at the lower court (p 138 of ROA).

E **[24]** Given the parties pleaded case and the evidence before the court, I am with the appellant that, it is not possible and totally illogical for the respondent to agree to pay the sum RM942,625.23 ('alleged advances') on top of the purchase price for the hotel, which was agreed at RM8.4m. There is no pleading or evidence to show that the respondent had in fact paid the total sum of RM9,342,625.23 (RM8,400,000 + RM942,625.23) to the appellant. F

[25] The respondent had clearly departed from the line of defence pleaded in its statement of defence and this is not allowed based on the Supreme Court case of *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152; [1990] 1 CLJ Rep 330 (SC). G

[26] The appellant therefore had proven its claim for the balance of purchase price due from the defendant and entitled to the 4% interest as per cl 3(d) of the sale and purchase agreement.

H

[27] On the 4% interest, it was contended by the respondent (based on para 12 of the statement of defence, p 12 of ROA and DW1's evidence (lines 14 and 17, p 50 and line 10, p 51 of ROA) that the appellant is only entitled to claim the 4% interest per annum for one month only ie from 1 October 2016 to 31 October 2016 totalling RM24,279.47 as follows: I

(a) 4%pa on RM7,560,000 from 1 October 2016 to 5 October 2016 @ five days (calculated at RM828.49 per day) amounting to RM4,142.47; and

(b) 4%pa on RM7,350,000 (RM7,560,000 – RM210,000 received on

6 October 2016) from 7 October 2016 to 31 October 2016 @ 25 days (calculated at RM805.48 per day) amounting to RM20,137.

[28] Respectfully, I found this contention to be misconceived. Clause 3(d) of the sale and purchase agreement (p 85 of ROA) must be read as a whole which provides:

> In the event that the Defendant shall fail to pay the purchase price on the completion date, the Plaintiff shall automatically grant to the Defendant a further extension of one (1) month from the completion date ('the extended completion date') to pay the purchase price, provided that interest shall be payable by the Defendant to the Plaintiff on the amount outstanding calculated at the rate of four (4) percent (4%) per annum from the expiry of the completion date until such time the purchase price is received by the Plaintiff within the extended completion date to be calculated on daily basis.

[29] The wordings in cl 3(d) could not possibly be read to limit the appellant's entitlement for the 4% interest for one month only. This is because the cl clearly states that the 4% interest shall be calculated from the expiry of the completion date (ie 30 September 2016) until such time the purchase price is received by the vendor within the extended completion date to be calculated on daily basis.

[30] By cl 3(b) of the sale and purchase agreement, the respondent was supposed to pay the full balance of the purchase price by 30 September 2016, which it failed or did not pay. As such, pursuant to cl 3(d), the respondent was automatically granted an extension of time of one month to pay the same subject to payment of interest of 4%pa from the expiry of the completion date until such time the purchase price is received by the appellant within the extended completion date to be calculated on a daily basis.

[31] I am with the appellant that the crucial words in that clause are 'until such time the purchase price is received by the vendor within the Extended Completion Date'. The words relied by the respondent ie 'within the Extended Completion Date' clearly do not refer to the time limit for payment of the 4% interest but refer to time frame for the respondent to make or pay the balance of the purchase price.

[32] The respondent had also contended that the appellant had waived the right to claim the 4% interest under cl 3(d) of the sale and purchase agreement (pleaded in para 5 of the statement of defence, p 11 of ROA).

[33] However, the respondent totally failed to substantiate this contention during the trial. DW1 admitted during cross-examination that he has nothing in writing to back up the contention (line 16, p 56 of ROA). DW1 during his

cross-examination had further confirmed that the terms and conditions of the sale and purchase agreement are binding on the parties and this should include the provisions of cl 3(d) which provides for payment of the 4% interest in the event that the balance of the purchase price was not paid after the completion date (line 8, p 55 of ROA).

[34] In any event, as rightly pointed out by the appellant, the respondent is not entitled to rely on this contention to vary or contradict the contents of the sale and purchase agreement, which is binding on the parties.

[35] Section 91 of the Evidence Act 1950 provides that:

> When the terms of a contract or of a grant or of any other deposition of property have been reduced by or by consent of the parties to the form of a document... no evidence shall be given in proof of the terms of the contract, grant or other deposition of property or of the matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

[36] In the Supreme Court case of *Inspector-General of Police & Anor v Alan Noor bin Kamat* [1988] 1 MLJ 260; [1988] 1 LNS 101 (SC), it was stated that:

> Oral evidence was led to the effect that the IGP gave his instructions to his deputy to initiate the impugned disciplinary proceeding. In our view, such evidence should not be admitted and if admitted should not be acted upon because it is clear that under s 91 of the Evidence Act no evidence can be given in proof of any matter which is required by law to be reduced to a form of a document and s 92 prohibits the giving of oral evidence to contradict or vary or explain the terms of such document.

[37] In view of the above, it is clear that the respondent is liable to the appellant for the late payment interest at the rate of 4%pa as provided under cl 3(d) the sale and purchase agreement dated 1 July 2016 ie RM143,734.94 as at 21 September 2018 (and continuing) as claimed by the appellant.

PRINCIPLES OF APPELLATE INTERVENTION

[38] In *Bank Pertanian Malaysia Berhad (dahulunya dikenali sebagai Bank Pertanian Malaysia) v Nora' rifah bt Darus* [2014] MLJU 490; [2014] 7 CLJ 631 (CA), it was stated that:

> At the outset we must say that the jurisdiction of the appellate court to intervene with the finding of facts by a trial judge is well defined in catena of decisions by our courts. It has been settled that an appellate court can intervene with the finding of facts when the findings are grounded entirely on speculations, surmises or conjectures; when an inference made by a trial court from its factual findings is plainly wrong, absurd or illogical; where there is none or insufficient judicial

appreciation of evidence; when the findings of a trial judge run contrary to the admission of the parties to the case, or fail to notice certain relevant facts which if properly considered, will justify a different conclusion; when the findings of fact are premised on the absence of evidence, or are contradicted by the evidence on record ...

[39] In *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545 (CA), in reversing the decision of the High Court, the Court of Appeal held that:

[1] A careful reading of the trial judge's judgment shows that the process of reasoning adopted by him for preferring the evidence of the defence witnesses is based upon a wrong premise and does not accord with well-established principle that goes to form the fulcrum upon which the scales of procedural justice turn.

[2] The trial judge had completely overlooked the inherent probabilities of the case. Bearing in mind the unchallenged evidence that the plaintiff was a person who had a history of following orders given him by those who held him in custody, the question which the trial judge ought to have asked is whether it was inherently probable that the plaintiff, on this isolated instance, would have dared disobey an express order given him not to climb the tree. Had the learned judge done so, he would, upon a proper assessment of the totality of the evidence, have come to the conclusion that the defence story was wholly improbable.

[3] This court is under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected himself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

[40] In the more recent case of *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1, after having looked at the various cases relating to the extent of intervention of an appellate court, the Federal Court concluded that an appellate court should not interfere with factual findings of a trial judge unless it was satisfied that the decision of the trial judge was plainly wrong or one that no reasonable judge could have reached. If it is not, the fact that the appellate court may have reached a different conclusion on the facts, is irrelevant.

[41] In the present appeal, this is a fit and proper case for this court to intervene and disturb the findings made by the lower court. The learned SCJ had clearly failed to consider the admitted facts and/or evidence in the form of judicial admissions or concessions in para 6 of Bundle C, in the pleadings, and the unequivocal admission on the part of the respondent's witness, DW1 on the main issue of this case and instead, had taken into consideration matters which were not pleaded.

A

CONCLUSION

[42] Having considered all facts in this matter as highlighted above, on the available evidence before it, I am persuaded that there are merits in this appeal warranting intervention.

B

[43] The learned SCJ had fall into error when she failed to consider that the total payment made by the respondent shows a shortfall of RM30,840.20 based on the crucial and conclusive evidence in the form of judicial admissions or concessions in para 6 of Bundle C, in the pleadings, and also unequivocal admission on the part of the respondent's witness, DW1.

C

[44] The appellant therefore had proven its claim for the balance of purchase price due from the defendant and the sum of RM143,734.94 as at 21 September 2018 (and continuing) being late payment interest at the rate of 4%pa as per cl 3(d) of the sale and purchase agreement.

D

[45] I therefore allowed this appeal with costs of RM6,000 subject to payment of allocator.

E

Appeal allowed with costs.

Reported by K Selvaraju

F

G

H

I